IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

## No. 75-729

MARY JANE ANDERSON,
AUDREY L. BURKE, et al.
Petitioners,

v.

BOARD OF EDUCATION,
PRINCETON CITY SCHOOL DISTRICT,
Respondent.

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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IN THE

# Supreme Court of the United States

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## No.

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MARY JANE ANDERSON,
AUDREY L. BURKE, et al.
Petitioners,

v.

BOARD OF EDUCATION,
PRINCETON CITY SCHOOL DISTRICT,
Respondent.

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

The petitioners, Mary Jane Anderson, Audrey L. Burke, and 58 other former employees of the respondent, pray for a writ of certiorari to review the orders of the Supreme Court of Ohio of September 12, 1975, overruling their motion to certify and dismissing, *sua sponte*, their appeals of right from the judgment entered on May 19, 1975, by the Court of Appeals for Hamilton County, Ohio, affirming the judgment of the Court of Common Pleas of Hamilton County, Ohio.

## OPINION BELOW

The Supreme Court of Ohio wrote no opinion. The Court of Appeals for Hamilton County, Ohio, rendered a written decision on May 19, 1975 (Appendix A, *infra* p. 20*), which was not reported.

## JURISDICTION

The orders of the Supreme Court of Ohio entered on September 12, 1975, overruling the petitioners' motions for an order directing the Court of Appeals for Hamilton County, Ohio, to certify its records (Appendix B, *infra*, p. 36), and dismissing, *sua sponte*, the appeal of right (Appendix C, *infra*, p. 37) are attached hereto.

The jurisdiction of this Court is invoked under Rule 19 of this Court and 28 U.S.C. 1257(3), which provides for review of final judgments rendered by the highest court of a state by writ of certiorari "where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under the United States."

## QUESTIONS PRESENTED

1. Are nonteaching public school employees, who enjoy civil service status under the laws of Ohio, deprived of their property and liberty without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States, where —

(a) the employer, Board of Education, makes the initial determination that such employees are on strike contrary to Chapter 4117, Ohio Revised Code, and thereafter conducts a hearing at which the employee has the burden of proving that he was not on strike;

(b) the employer, Board of Education, denies such employees the right to examine the members of the Board with respect to their prejudice, or lack thereof, on the subject matter of the hearing;



(c) the President of the Board of Education, upon becoming a witness for the employer, Board of Education, sustains objections to questions being asked of him by such employees.

2. Does Chapter 4117, Ohio Revised Code, to the extent that it deprives nonteaching public school employees, who enjoy civil service status under the laws of Ohio, of a fair hearing by a fair tribunal, constitute an unconstitutional deprivation of due process of law?

## PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The text of the relevant constitutional and statutory provisions involved herein is contained in Appendix D, *infra*, p. 38. These relevant provisions are:

Fourteenth Amendment to Constitution of the United States;

§§143.01, 143.08, 143.27, 4117.01, 4117.02, 4117.03, 4117.04, and 4117.05, Ohio Revised Code.

## STATEMENT OF THE CASE

On January 24, 1972, the President and Clerk of the respondent, Board of Education of the Princeton City School District, sent letters to the 60 petitioners, who, pursuant to §143.01, Ohio Revised Code, enjoy civil service status and full tenure, reading in pertinent part:

"Dear

"At the direction of the Princeton Board of Education, I hereby notify you that you are deemed to be on strike in violation of sections 4117.01 to 4117.05, inclusive, of the Ohio Revised Code. Please be advised that upon written request to the Board of Education, a hearing will be granted during which

you will be given the opportunity to establish that you did not violate the aforementioned sections. Section 4117.04 Ohio Revised Code requires such written request be filed within ten days after regular compensation of such employee has ceased. In calculating the final date for filing the request, exclude the first day and count the last day. When the last day falls on Sunday or a legal holiday, the last day for filing a request for hearing is the next succeeding day which is not a Sunday or legal holiday."

Pursuant to a timely request for a hearing by the petitioners, hearings were held by the respondent, Board of Education, on Thursday, February 10, 1972, Saturday, February 12, 1972, Monday, February 14, 1972, and Monday, February 21, 1972. At the Thursday, February 10, 1972, hearing, only four of the five Board of Education members were present. At all the other hearings, all five members of the respondent, Board of Education, were present.

The format for each of the hearings of the individual petitioners followed essentially the same pattern, namely — at the outset of each hearing, counsel for the petitioners raised a number of basic objections to the hearings, to-wit: (a) respondent had not properly invoked the provisions of Chapter 4117, Ohio Revised Code; (b) the respondent was not a fair and impartial body inasmuch as the respondent was acting as accuser and prosecutor as well as trier of the facts; (c) the respondent, in holding the hearings, was not properly constituted as a body to render a decision; and (d) the individual Board members were not qualified as fair and impartial adjudicators. Further, petitioners raised the fundamental issue that Chapter 4117, Ohio Revised Code, is unconstitutional on its face.

All such objections raised by counsel for the petitioners were overruled and the hearings proceeded. Thereupon, petitioners' counsel sought to examine each member of the respondent as to the individual Board member's fairness and lack of prejudice with respect to the issues involved. Counsel for petitioners also sought to examine the Clerk-Treasurer of the Board of Education to determine whether the original meeting had been properly called and whether the necessary notices, in fact, had been delivered. The President of the respondent, Board of Education, denied each of the requests. Thereupon, counsel for the respondent presented testimony by way of the President of the respondent and the respondent's transportation supervisor. The petitioners did not take the stand as witnesses in their own behalf, but through their counsel, attempted to read a statement of their position in the dispute. However, the President of respondent, Board of Education, as presiding officer, denied petitioners the opportunity to read such statement.



Following each such hearing, the respondent found that the petitioners had violated Chapter 4117, Ohio Revised Code, as charged. Thereupon, petitioners appealed to the Court of Common Pleas of Hamilton County, Ohio, pursuant to Chapter 2506, Ohio Revised Code, which Court affirmed the action as taken by the respondent. Petitioners appealed to the Court of Appeals for Hamilton County, Ohio, from the judgment of the Court of Common Pleas of Hamilton County, Ohio. On May 19, 1975, the Court of Appeals for Hamilton County, Ohio, affirmed the judgment of the trial court. The judgment of the Court of Appeals was journalized on the same day.

As noted above, on September 12, 1975, the Supreme Court of Ohio overruled the petitioners' motions to

certify and dismissed, *sua sponte*, the petitioners' appeal of right.

## HOW FEDERAL QUESTIONS PRESENTED

The constitutional questions here involved were first put in issue at the hearings before the respondent, Board of Education, and reiterated before the Court of Common Pleas for Hamilton County, Ohio, the Court of Appeals for Hamilton County, Ohio, and stated again in the petitioners' memorandum in support of jurisdiction in the Supreme Court of Ohio in Case No. 75-604.

## REASONS FOR GRANTING THE WRIT

### A.

**The Petitioners, As Nonteaching Employees Of A City School District, Who Enjoy Civil Service Status Under The Laws Of Ohio, Have Property And Liberty Interests Protected By The Due Process Clause Of The Fourteenth Amendment To The Constitution Of The United States.**

The Fourteenth Amendment to the Constitution of the United States provides, *inter alia*, that —

> " *** No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

State action is clearly present in the case at bar. The Princeton City School District is organized under the laws of the State of Ohio. The respondent, Board of Education, is charged by Chapter 3313, Ohio Revised Code,



with management of the school district. The district, the Board, and their agents are plainly extensions of the State of Ohio.

The applicability of the constitutional guarantee of procedural due process depends upon the existence of petitioners' legitimate "property" or "liberty" interest within the meaning of the Fourteenth Amendment. As this Court observed in *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 2709 (1972) —

> "Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement of those benefits.***"

Also see, *Goss v. Lopez*, ___ U.S. ___, 95 S. Ct. 729 (1975).

A state employee who, under state law or rule promulgated by state officials, has a legitimate claim of entitlement to continued employment, absent sufficient cause for discharge, may demand the procedural protections of due process. *Goss v. Lopez*, ___ U.S. ___, 95 S. Ct. 729 (1975); *Connell v. Higginbotham*, 403 U.S. 207, 91 S. Ct. 1772 (1971); *Wieman v. Updegraff*, 344 U.S. 183, 73 S. Ct. 215 (1952); *Arnett v. Kennedy*, 416 U.S. 134, 94 S. Ct. 1633 (1974).

This Court has equated property interest with an "entitlement", whether statutory or otherwise. No distinction is to be drawn whether the interest is based upon a "right" or "privilege". See, *Perry v. Sindermann*, 408 U.S. 593, 92 S. Ct. 2694 (1972); *Bell v. Burson*, 402 U.S. 535, 91 S. Ct. 1586 (1971); *Goldberg v. Kelly*, 397

U.S. 254, 90 S. Ct. 1011 (1970); *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 89 S. Ct. 1820 (1969); *Slochower v. Board of Higher Education*, 350 U.S. 551, 76 S. Ct. 637 (1956); *Boddie v. Connecticut*, 401 U.S. 371, 91 S. Ct. 780 (1971); VanAlstyne, "The Demise of the Right, Privilege, Distinction in Constitutional Law", 87 Harv. L. Rev. 1439 (1968).

In the case at bar, the petitioners were employees of the respondent, Board of Education, Princeton City School District, and as such enjoyed civil service status. This is clearly provided for in §143.01, Ohio Revised Code, which reads in pertinent part:

> "As used in sections 143.01 to 143.48, inclusive, of the Revised Code:
> "(A) 'Civil service' includes all offices and positions of trust or employment in the service of the state and the counties, cities, city health districts, general health districts, and city school districts thereof."

The tenure of civil service employees is protected by §143.27, Ohio Revised Code, which reads in pertinent part:

> "The tenure of every officer or employee in the classified service of the state and the counties, cities, city health districts, general health districts, and city school districts thereof, holding a position under sections 143.01 to 143.48, inclusive, of the Revised Code, shall be during good behavior and efficient service and no such officer or employee shall be reduced in pay or position, suspended, or removed, except for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of such sections or the rules of the director of state personnel or the commission, or any other failure of good behavior, or any other acts of misfeasance, malfeasance, or nonfeasance in office."



Pursuant to §143.08, Ohio Revised Code, the petitioners, as nonteaching employees of the respondent, were in the classified civil service.

This Court has held that the right to hold specific private employment and to follow a chosen profession, free from unreasonable governmental interference, comes within the "liberty" and "property" concepts of the Fifth Amendment, "property" being the employment and "liberty" being the freedom to practice a chosen profession. *Dent v. West Virginia*, 129 U.S. 114, 95 S. Ct. 231 (1889). Also see, *Fitzgerald v. Hampton*, 467 F. (2d) 755 (C.A., D.C., 1972).

The Supreme Court of Wisconsin in *Hortonville Education Association, et al. v. Hortonville Joint School District No. 1, et al.*, 66 Wis. (2d) 469, 225 N.W. (2d) 658 (1975), found that teachers who were discharged for allegedly engaging in an unlawful strike and for breach of their contracts of employment were deprived of property and liberty within the intendment of the due process of law requirement of the Fourteenth Amendment.

In the case at bar, the stated reason for terminating the employment of petitioners by the respondent was that the petitioners had engaged in a strike contrary to the law of Ohio. It is apparent that such charges could adversely affect the individual petitioner's reputation in the labor market and thus, significantly undermine the opportunities for re-employment of each individual petitioner.

Plainly, the petitioners, as classified civil service employees of a city school district, have liberty and property rights sufficient to invoke the protection of the due

process clause of the Fourteenth Amendment to the Constitution of the United States.

**B.**

**Chapter 4117, Ohio Revised Code, Which Confers Quasi-Judicial Hearing Powers Upon The Respondent, Board Of Education, Combines The Roles Of Accuser, Prosecutor, Judge, And Jury, Thereby Denying The Petitioners A Fair Hearing By A Fair Tribunal And, Hence, Deprives Them Of Procedural Due Process.**

A fair hearing in a fair tribunal is a basic requirement of due process. *Tumey v. State of Ohio,* 272 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749, 50 A.L.R. 1243 (1927). Chief Justice Taft, speaking for this Court in *Tumey* said (50 A.L.R. 1248), *inter alia*:

> "That officers acting in a judicial or quasi judicial capacity are disqualified by their interest in the controversy to be decided is of course the general rule. Dimes v. Grand Junction Canal, 3 H. L. Cas. 759, 10 Eng. Reprint 301; Gregory v. Cleveland C. & C. R. Co. 4 Ohio St. 675; Pearce v. Atwood, 13 Mass. 324; Taylor v. Worcester County, 105 Mass. 225; Kentish Artillery v. Gardiner, 15 R. I. 296; Moses v. Julian, 45 N.H. 52, 84 Am. Dec. 114; State, Winana, Prosecutor, v. Crane, 36 N.J.L. 394; Peninsular R. Co. v. Howard, 20 Mich. 18; Stockwell v. White Lake, 22 Mich. 341; Findley v. Smith, 42 W. Va. 299, 26 S.E. 370; Nettleton's Appeal, 28 Conn. 268; Cooley, Const. Lim. 7th ed. pp. 592 et seq.***"

Chief Justice Taft (50 A.L.R. 1254) further said:

> "Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused, denies the latter due process of law."

And the Chief Justice further aptly observed (50 A.L.R. 1255) that —



> "*** A situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him. Boston v. Baldwin, 139 Mass. 315, 1 N.E. 417; State ex rel. Colcord v. Young, 31 Fla. 594, 19 L.R.A. 636, 34 Am. St. Rep. 41, 12 So. 673.***"

More recently, this Court, in *In re Murchison,* 349 U.S. 133, 75 S. Ct. 623 (1955), held that the fact that the same judge who had sat as the Michigan "judge-grand jury" before such witnesses had testified, presided at a contempt hearing wherein witnesses were adjudged in contempt for their conduct before the "one-man grand jury", constituted a violation of due process. Mr. Justice Black, speaking for the Court, at page 136, said, in pertinent part:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered.***"

In *Offutt v. United States,* 348 U.S. 11, 75 S. Ct. 11 (1954), this Court held that where a trial judge had become personally embroiled with counsel throughout the trial, he should have invited the Chief Justice of the District Court to assign another judge to sit in hearing of a contempt charge against counsel. Mr. Justice Frankfurter, in delivering the opinion of the Court, pointedly said, at page 14 — "justice must satisfy the appearance of justice." Also see, *Mayberry v. Pennsylvania,* 400 U.S. 455, 91 S. Ct. 499 (1971); *In re Contempt of*

*Common Pleas Court, Probate Division,* 30 Ohio St. (2d) 182, 283 N.E. (2d) 126 (1972).

The common law rule of disqualification applicable to judges extends to every tribunal exercising judicial or quasi-judicial functions. *State ex rel. Miller v. Aldridge,* 212 Ala. 660, 103 So. 835, 39 A.L.R. 1470; *Federal Construction Co. v. Curd,* 179 Cal. 489, 177 P. 469, 2 A.L.R. 1202; *Naperville v. Wehrle,* 340 Ill. 579, 71 A.L.R. 535; *Emerson v. Hughes,* 117 Vt. 270, 34 A.L.R. (2d) 539; 1 Am. Jur. (2d), Administrative Law, §63. An administrative officer exercising quasi-judicial power is disqualified and incompetent to sit in a proceeding in which he has prejudged the case or where he is biased and prejudiced toward a party. I Am. Jur. (2d), Administrative Law, §64, and numerous cases cited therein. The right to a fair, open and impartial administrative hearing is an inexorable safeguard and one of the rudiments of fair play assured to every litigant by the Fourteenth Amendment to the Constitution of the United States as a minimal requirement. *Gibson v. Berryhill,* 411 U.S. 564, 93 S. Ct. 1689 (1973); *Ward v. Village of Monroeville,* 409 U.S. 57, 93 S. Ct. 80 (1972); *Morrissey v. Brewer,* 408 U.S. 471, 92 S. Ct. 2593 (1972); *Goldberg v. Kelly,* 397 U.S. 254, 90 S. Ct. 1011 (1970); *Morgan v. United States,* 304 U.S. 1, 58 S. Ct. 773 (1938); *Ohio Bell Telephone Company v. Public Utilities Commission,* 301 U.S. 292, 57 S. Ct. 724 (1937); *St. Joseph Stock Yards Co. v. United States,* 298 U.S. 38, 56 S. Ct. 720 (1936); *West Ohio Gas Co. v. Public Utilities Commission,* 294 U.S. 63, 55 S. Ct. 316 (1935); *West Ohio Gas Co. v. Public Utilities Commission,* 294 U.S. 79, 55 S. Ct. 324 (1935).

§4117.04, Ohio Revised Code, popularly known as the "Ferguson Act", reads as follows:



> "Any public employee who, without the approval of his superior, unlawfully fails to report for duty, absents himself from his position, or abstains in whole or in part from full, faithful, and proper performance of his position for the purpose of inducing, influencing, or coercing a change in the conditions, as compensation, rights, privileges, or obligations of employment or of intimidating, coercing, or unlawfully influencing others from remaining in or from assuming such public employment is on strike, provided that notice that he is on strike shall be sent to such employee by his superior by mail addressed to his residence as set forth in his employment record. Such employee, upon request, shall be entitled to establish that he did not violate sections 4117.01 to 4117.05, inclusive, of the Revised Code. Such request must be filed in writing, with the officer or body having power to remove such employee, within ten days after regular compensation of such employee has ceased. In the event of such request such officer or body shall within ten days commence a proceeding for the determination of whether such sections have been violated by such public employee, in accordance with the law and regulations appropriate to a proceeding to remove such public employee. Such proceeding shall be undertaken without unnecessary delay."

§4117.04, Ohio Revised Code, expressly provides that any public employee, who fails to report for duty or abstains in whole or in part from full, faithful and proper performance of his position for the purpose of inducing, influencing or coercing a change in the conditions of public employment, must be sent notice by his superior that he is on strike.

*Abbott v. Myers,* 20 Ohio App. (2d) 65, 251 N.E. (2d) 869 (1969), held that for the purpose of sending the notice provided for by §4117.04, Ohio Revised Code, a board of county commissioners is the "superior" of employees

of the county department of welfare and of employees of the county home and county home hospital. Following the decision in *Abbott*, the Ohio courts in the instant case, have determined that the notice given by the respondent, Board of Education, to the petitioners that "you are deemed to be on strike in violation of sections 4117.01 to 4117.05, inclusive, of the Ohio Revised Code" is a proper notice by the "superior" of the petitioners. Also see, *Goldberg v. City of Cincinnati*, 26 Ohio St. (2d) 228, 271 N.E. (2d) 284 (1971).

The employee-employer struggle between petitioners and the respondent over representative rights, which escalated to the point where petitioners walked off the job and where the respondent notified petitioners that they were deemed on strike contrary to the laws of Ohio, made them adversaries. The notice sent to petitioners by the respondent recited in the words of the statute "you are" deemed to be "on strike", plainly shows prejudgment. Having battled the petitioners on the representation issue and having made the judgment that petitioners were deemed "on strike", it can hardly be contended seriously that respondent could fairly and impartially hear the cases of those whom it had so vigorously opposed.

Any statute, such as §4117.04, Ohio Revised Code, which combines the roles of accuser, prosecutor, judge and jury, has an obvious built in unfairness. For this reason, Chapter 4117, Ohio Revised Code, popularly known as the Ferguson Act, is unconstitutional on its face. The Court has a similar issue pending before it in No. 74-1638, *Hortonville Education Association, et al. v. Hortonville Joint School District No. 1, et al.*



## C.

**The Procedures Followed By The Respondent In The Hearings Afforded To The Petitioners Under Chapter 4117, Ohio Revised Code, In Fact, Deprived Petitioners Of Their Property And Liberty Interests Without Due Process Of Law Where — (a) Respondent Had Initially Determined That Petitioners Were On Strike And Thereafter Conducted A Hearing At Which Petitioners Had The Burden Of Proving That They Were Not On Strike; (b) Respondent Denied The Petitioners The Right To Examine The Members Of The Board Of Education With Respect To Their Lack Of Prejudice On The Subject Matter At The Hearing; And (c) The President Of Respondent, Board Of Education, Upon Becoming A Witness For The Employer, Sustained Objections To Questions Being Asked Of Him By Petitioners.**

The essential unfairness of authorizing the respondent, which already had determined that the petitioners were on strike contrary to Chapter 4117, Ohio Revised Code, to conduct the hearings discussed in Topic B hereof, will not be repeated here. It should be noted, however, that the respondent, having determined initially that the petitioners were deemed on strike in violation of the so-called "Ferguson Act", placed the burden of proof that the petitioners were not on strike upon petitioners, the initial determination being presumed to continue.

Plainly, petitioners were denied procedural due process when respondent denied petitioners the right to examine the members of the respondent, Board of Education, as to their prejudice, or lack thereof, on the subject matter of the hearing. A fair hearing before a fair tri-

bunal obviously requires an absence of actual bias or prejudice. The only way to determine whether actual bias or prejudice exists is to examine the triers of the facts. Ordinarily, such an examination is unnecessary and uncalled for. However, in the instant case, the respondent, having initially deemed the petitioners to be on strike and being the agency conducting the hearing, must be presumed to have been biased and prejudiced. Under these circumstances, the examination of the members of the respondent, Board of Education, was indispensable. The likely presence of bias on the part of the respondent at these hearings made the examination of the members of the respondent, Board of Education, essential.

The respondent plainly denied procedural due process to the petitioners when the President of the respondent, upon becoming a witness for the employer, Board of Education, sustained objections to questions being asked of him by petitioners. This aspect of petitioners' case can best be illustrated by a brief excerpt from the Anderson record —

**"CROSS-EXAMINATION**

"BY MR. GEE [Counsel for employee]:
"Q Mr. Cook, on January the 24th, 1972, did you have a Board meeting?
"MR. FREEMAN [Counsel for Board of Education]: Objection.
"PRESIDENT COOK: We'll sustain the objection.
"Q Mr. Cook, did you receive some prior telegrams to the telegram that you have identified and has been admitted as Exhibit Number 1?
"MR. FREEMAN: Objection.
"PRESIDENT COOK:We'll sustain the objection.
"Q Did you receive any telegrams from anybody asking that you sit down and meet and consult with



the school bus drivers of the Princeton City School District?
"MR. FREEMAN: Objection.
"PRESIDENT COOK: Sustained.
"Q Mr. Cook, have you not had an exchange of telegrams and exchange of telegrams and exchange of telegrams between the bus drivers or their representatives and the Board of Education or yourself concerning a problem with the school bus drivers?
"MR. FREEMAN: Objection.
"PRESIDENT COOK: We are sustaining the objections because they are irrelevant to the hearing.
"Q Mr. Cook, I show you what has been marked as Board's Exhibit Number 1 and ask you to look at that Exhibit 1. That contains your signature, does it not?
"MR. FREEMAN: Mr. Gee, I think maybe I've got the numbers mixed up. Are you referring to one of the original papers?
"MR. GEE: Oh, that's a joint exhibit.
"MR. FREEMAN: I think —
"MR. GEE: Joint Exhibit Number 1.
"MR. FREEMAN: — it's Joint Exhibit 1, because the telegram is what I had marked as Board Exhibit Number 1, since I thought we could —
"MR. GEE: Okay.
"Q Joint Exhibit Number 1, Mr. Cook.
"A Would you repeat the question?
"Q You did sign that, did you not?
"MR. FREEMAN: Objection, on the ground that the document is already introduced into evidence and that, therefore, there is no basis to question the authenticity of the document.
"Q Mr. Cook, referring to Joint Exhibit Number 1, that purports to be a letter, does it not, from the Board of Education? Is that correct?
"MR. FREEMAN: Objection.
"Q (Continuing) Signed by yourself and the Clerk-Treasurer of the Board of Education?

"MR. FREEMAN: Objection, on the basis that the document speaks for itself.
"PRESIDENT COOK: Sustained.
"Q Mr. Cook, Exhibit Number 1 says specifically that the Board of Education — it's a letter dated January the 24th — that the Board of Education deems people to be on strike. Now, I'm asking you, did the Board of Education meet on January the 24th?
"MR. FREEMAN: Objection.
"PRESIDENT COOK: Sustained.
"Q Did the Board of Education meet on January the 23rd?
"MR. FREEMAN: Objection.
"PRESIDENT COOK: Sustained.
"Q Did the Board of Education meet on January the 25th?
"MR. FREEMAN: Objection.
"PRESIDENT COOK: Sustained.
"Q Mr. Cook, did you call this Board meeting for tonight?
"MR. FREEMAN: Objection.
"PRESIDENT COOK: Sustained.
"Q Did you receive a written notice of this Board meeting for tonight?
"MR. FREEMAN: Objection.
"PRESIDENT COOK: Sustained.
"Q Mr. Cook, have you made up your mind that these people are on strike that you called for this hearing tonight?
"MR. FREEMAN: I'll object, but I'll object technically and let him answer.
"A Would you rephrase — repeat the question?
"MR. GEE: Would the court reporter read that back, please.
"(Question read.)
"A No, I have not.
"Q Why not?
"MR. FREEMAN: Objection.



"PRESIDENT COOK: Sustain the objection.
"Q Mr. Cook, can you tell me whether a written notice of this meeting tonight was sent to the absent Board member?
"MR. FREEMAN: Objection.
"PRESIDENT COOK: Sustained.
"Q Is this a regularly scheduled meeting tonight for this Board of Education, Mr. Cook?
"MR. FREEMAN: Objection.
"PRESIDENT COOK: Sustained."

The record in the proceeding before the respondent, Board of Education, quoted above, flagrantly offends a sense of justice. Any vestige of a fair hearing before a fair tribunal vanished when the President of the respondent, having assumed the role of prosecuting witness, sustained every objection raised by counsel for the respondent. Certainly, this Alice in Wonderland type of hearing has no place in the American scheme of justice. Obviously, the respondent, in these hearings which it conducted, acted as accuser, prosecutor, judge and jury, thereby lacking even a "modicum of fairness" which was found essential in *Cooley v. Board of Education of Forrest City School District*, 453 F. (2d) 282 (C.A. 8, 1972).

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,
LUCAS, PRENDERGAST, ALBRIGHT,
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By RANKIN M. GIBSON
*Attorneys for Petitioners*

## APPENDIX A

## IN THE COURT OF APPEALS OF HAMILTON COUNTY, OHIO

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**No. C-74246**

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In the Matter of the Appeal of
MARY JANE ANDERSON ET AL.,
Appellants,

v.

BOARD OF EDUCATION,
PRINCETON CITY SCHOOL DISTRICT,
Appellee.

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**No. C-74247**

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In the Matter of the Appeal of
AUDREY L. BURKE ET AL.,
Appellants,

v.

BOARD OF EDUCATION,
PRINCETON CITY SCHOOL DISTRICT,
Appellee.

**DECISION**
**May 19, 1975**

LUCAS, PRENDERGAST, ALBRIGHT,
GIBSON, BROWN & NEWMAN,
MR. PETER J. GEE and
MR. W. JOSEPH STRAPP, *of Counsel,*
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*For Appellee.*

HOLMES, J., sitting by assignment.

These matters involve the appeals of judgments of the Common Pleas Court of Hamilton County, Ohio, affirming the action as previously taken by the appellee Board of Education of the Princeton City School District, which board had found the appellants to be on strike from their school employment and, as such, in violation of the so-called Ferguson Act as found within Title 41 of the Ohio Revised Code.

The basic facts upon which these matters were before the Common Pleas Court upon appeal from the action of the school board, and thence to this court upon appeal, are as follows. The appellants were employed by the appellee school board as school bus drivers. The appellants attempted to obtain recognition by the appellee of the Ohio Association of Public School Employees as their representative for bargaining purposes, but the appellee board refused to so recognize the bargaining agent. Consequently, the appellants refused to report for work on a certain date, and engaged in picketing and other and various related activities at a number of the school buildings of the school district.

Letters over the signature of Mr. James Cook, president of the Princeton Board of Education, and Edna Mae Heiman, clerk of the board, were sent to all of the appel-

lants, notifying the appellants that they were "deemed to be on strike" in violation of the Ferguson Act. The appellants requested hearings in order to establish that they were not in violation of the Ferguson Act, and the appellee board thereafter conducted hearings to determine whether in fact each of the individual appellants had been on strike.

It would appear from the record herein that the format for each of the hearings of the individual appellants in essence followed the same pattern in that, at the outset of each hearing, counsel for the appellants raised a number of basic objections to the hearings. Such objections were that the appellee board had not properly invoked the Ferguson Act, that the appellee board was not a fair and impartial body in that such board was acting as prosecutor as well as trier of the facts, as alleged in such notification upon which the hearings were based, and that, as such, the entire proceedings were unconstitutional. Further the appellants at the outset raised the fundamental legal question that the Ferguson Act was unconstitutional on its face.

All such objections as raised by counsel for the appellants were overruled and the hearing proceeded, whereupon the appellants' counsel sought to examine each member of the appellee board as to the individual board member's fairness and lack of prejudice towards the matter before them. Further, counsel for the appellants sought to examine the clerk-treasurer of the appellee board to determine whether the original meeting had been properly called, and whether the necessary notices had been in fact delivered. The president of the board denied each of the requests. The record would show that the appellee board presented testimony, by way of the supervisor of the appellants, to the effect that each of



the appellants had not presented himself for duty on a given date in question and, further, testimony that he had seen the individual appellants at certain and various times picketing and engaging in other activities surrounding the alleged strike.

The appellants refused to take the stand as witnesses in their own behalf, but, through their counsel, attempted to read a statement of their position in the matter. However, the opportunity to read such statement was denied by the presiding officer of the board.

The appellee board, following each such hearing, found that the appellants, and others as charged, had violated the Ferguson Act. These appellants then appealed to the Court of Common Pleas of Hamilton County, pursuant to Chapter 2506 of the Revised Code, which court affirmed the action as taken by the appellee board.

The appellants set forth the following assignments of error:

"I. The court below erred in finding that appellants had not been denied procedural due process at the hearing conducted by appellee, the Princeton Board of Education.

"A. Appellants were denied procedural due process when appellee both made the initial determination that appellants were on strike and then conducted the hearings at which appellants had the burden of proving they had not been on strike.

"B. Appellants were denied procedural due process when appellee denied appellants the right to examine the members of appellee as to their lack of prejudice toward the matter before them at the hearings.

"C. Appellants were denied procedural due process when the president of the Princeton Board of

Education ruled on objections to questions being asked the president by counsel for the parties.

"II. The court below erred in finding that Ferguson Act hearings do not constitute a per se denial of due process of law.

"III. The court below erred in finding that appellee had properly invoked the Ferguson Act against appellants.

"A. Appellee invoked the Ferguson Act without appellants having been on strike.

"B. Appellants were not notified by their superior that they were on strike.

"C. Since the record is devoid of any evidence that appellants failed to report for duty without the approval of their superior, the invocation of the Ferguson Act by appellee was improper.

"D. The letters sent by appellee to appellants failed to comply with the statutory notice requirements of Section 4117.04, Revised Code.

"E. As a result of appellee's refusal to allow counsel for appellants to examine the clerk-treasurer of appellee as to whether appellee had lawfully met before sending appellants the letters deeming appellants to be on strike, appellants were irrevocably prejudiced."

At the outset, we shall speak to the second assignment of error, in that it goes to the basic constitutionality of the Ferguson Act as a claimed violation of the appellants' due process of law rights. The claimed denial of due process in the procedure as set forth in R. C. 4117.04, as claimed by the appellants, is that the employees cannot be afforded a fair hearing before a fair tribunal if such tribunal is the same body which has already sent out the notice to such employees that the latter are deemed to be on strike.



We believe that the issue as presented in this instance has been squarely decided by the Tenth District Court of Appeals, in the case of *Abbott v. Myers* (1969), 20 Ohio App. 2d 65, which was a matter questioning the notice as sent out by the commissioners, as being the superior of the employees of the county department of welfare and employees of the county home and county home hospital, and wherein we find the first paragraph of the syllabus of the court to be as follows:

"1. For the purpose of sending the notice provided for by Section 4117.04, Revised Code, to an employee that he is on strike contrary to the provisions of Chapter 4117, Revised Code (The Ferguson Act), a board of county commissioners is the 'superior' of employees of the county department of welfare and of employees of the county home and county home hospital."

The court, in *Abbott*, held that under the provisions of law the board of county commissioners has power to control the appointment and removal of the employees involved in that litigation and, therefore, that the board was the proper one to conduct the proceedings as prescribed by R. C. 4117.04. The court, in *Abbott*, further held in paragraph four of the syllabus, as follows:

"4. The Ferguson Act does not violate free speech, violate procedural due process, violate the requirements of definiteness, constitute a bill of attainder, or vest judicial power in an officer or body having no authority to exercise judicial power, contrary to the provisions of either the Constitution of Ohio or the Constitution of the United States."

As stated, the fact complained of here in the application of the Ferguson Act, as to the hearing on the alleged claim of the strike by the employees, was that the Board

of Education made both the initial determination that the employees were on strike prior to sending out the notice and then, after conducting such a hearing on the matter, made the ultimate determination that such employees were in fact on strike.

We hold that R. C. 4117.04 contemplates an initial finding that the employees are on strike, and that such finding only serves to initiate the notice to such employees and is not the ultimate determination of any violation of the chapter.

Although the Supreme Court of Ohio, in *Goldberg v. Cincinnati* (1971), 26 Ohio St. 2d 228, did not specifically pass upon the constitutionality of the Ferguson Act, as it would relate to any claim of a denial of due process, the court recognized that Chapter 4117 of the Revised Code prohibited strikes by public employees, and pointed out the procedures as established by the legislature by which sanctions may be applied for engaging in such strikes, by setting forth, in the second paragraph of the syllabus, the following:

> "2. R. C. Chapter 4117 establishes and prohibits statutory strikes by public employees, and delineates sanctions for engaging in such strikes."

Further the court, in *Goldberg*, held that the provisions of such chapter, as they would relate to any violations thereof, were not self-executing, and provided in paragraph three of the syllabus as follows:

> "3. R. C. 4117.04 provides that a public employee is not engaged in a statutory strike in violation of R. C. Chapter 4117 unless he is sent the notice prescribed in that section."

Here we find that the fact that the notice as sent out to the appellants by the secretary of the board, and the fact that the hearing upon the issue of whether the notified employees were in fact on strike was to be conducted by the same body which sent out the notice, do not in fact deny these appellants the due process of law as afforded by the Ohio or United States Constitution. The hearings, after notice was given to the employees, were public hearings, the employees were afforded the opportunity of counsel, counsel was afforded the opportunity on behalf of the employees to cross-examine witnesses as presented by the Board of Education, and also permitted to present any and all evidence or testimony on behalf of such employees in answer to the charge that they were on strike. We hold that all due process in this regard has been afforded by this statute, and this assignment of error is hereby dismissed.



The appellants also argue that the refusal by the presiding officer of counsel's request to cross-examine the members of the board constitutes a denial of due process. We hold that the due process right of examining witnesses within such a procedure, as set forth in R. C. 4117.04, contemplates the cross-examination of those witnesses as presented by the board on the issue to be heard by the board, and that is the issue of whether the employees are on strike. Such right of cross-examination would not extend to board members who are hearing such issue pursuant to a procedure set forth in such code, and the denial of the motion to so interrogate the members does not constitute a denial of due process of these appellants, and does not constitute reversible error. In like manner, we do not find any denial of due process in the rulings of the presiding officer on objections to questions as being asked of the president by counsel for these appellants. Although such rulings may have appeared to be rather summarily given to each and every objection and question as raised by counsel for the ap-

pellants, and even though such rulings may not have been bulwarked by appropriate reasons as given by the presiding officer, we hold that all of such rulings on the specific objections do not provide reversible error upon the appeal of the basic matters herein.

For all of such reasons, each such branch of the first assignment of error is hereby overruled.

As to assignment of error number three, the appellants assert that the Common Pleas Court erred in finding that appellee had properly invoked the Ferguson Act against appellants, in that "(A) appellee invoked the Ferguson Act without appellants having been on strike."

Here we note within the record that the board in fact had sent letters to the employees who had not reported for work on the specific date of January 24, 1972, stating that they were in fact on strike and setting forth that, if requested, a hearing could be conducted upon such issue. Such letter was sent out only after the board had determined that the employees had not reported for work on such date, and that such employees had been engaged in congregating in and about the various schools in the district and carrying signs relating to their request for recognition. Such was testified to by the supervisor of the striking employees.

The basic reason for the employees to have left their employment was the fact that the appellee board had failed to recognize the collective bargaining agency as requested by the appellants. We hold that the demand for recognition of such a labor organization as the collective bargaining representative does in fact constitute a "strike within the meaning of the Ferguson Act." Such legal proposition has been previously recognized by Tenth District Court of Appeals in the case of *Abbott v. Myers, supra,* wherein the court stated as follows:



> "Without reference to any other activity of the affected employees * * * it is obvious that their protest over the refusal to recognize the local as their bargaining representative was for the purpose of inducing, influencing, or coercing the board to recognize the local, and that the granting of recognition would constitute a change in the conditions, rights, privileges and obligations of their employment by permitting collective rather than individual bargaining."

Subsection (B) of appellants' third assignment of error is to the effect that the appellants were not notified by their *superior* that they were on strike. As we have previously noted herein, the notification to the appellant employees was made by the secretary of the Board of Education on behalf of the board, and we have previously held herein, and restate, that such may be deemed as a notification from their *superior* as to their status and such notification does in fact comply with R. C. 4117.04.

Subsection (C) of appellants' third assignment of error states that the record is devoid of any evidence that the appellants failed to report for duty without the approval of their superior. However, a perusal of the record will show that the testimony of the supervisor of the appellant employees had not given the drivers any authority to be absent on the date in question, nor had the superior employing authority, the Board of Education. The record will show that the notices to the employees in pursuance of R. C. 4117.04 were sent out by the board after being informed of the inattendance of the appellant employees to their duties on the given date in question, and such notices were sent out in accordance with the information that the employees were so absent from their place of employment.

As to the matters contained in subsection (D) of appel-

lants' assignment of error number three that the wording contained in such notification did not comply with R. C. 4117.04, in that it did not state that they were "on strike" but in fact only stated that they were "deemed to be on strike," such is a matter of semantics, and we hold that the language in fact placed the individual employees on notice that the board considered each of the employees to be on strike and as such were informing them in compliance with R. C. 4117.04 for purposes of further due process hearing for each of the involved employees.

Subsection (E) of the appellants' third assignment of error in effect argues that the notification and the invoking of the Ferguson Act was improper, in that there was not established upon the record the fact that the decision to send such letters was made at a lawful board meeting. We hold that such subsection of this assignment is without merit and that the basic facts of the record reveal no irregularity in the procedure employed by the board. The strike notification letter was signed by both the president and the clerk of the board, and all of the members of the board were in attendance at each of the hearings scheduled in relation to each of the notices as sent out to the individual employees, and it would appear that the entire procedure as carried out was to afford the protection of the rights of the individual employees and to grant them their due process rights upon any such hearings. All parties were present at the time of such hearings and the proceedings afforded each employee the full opportunity to explore the initial strike statement as sent out by the Board of Education, and to cross-examine all witnesses as presented by the board.

We hold that there is a presumption of the validity of the action of the board, and the refusal of the board to set forth in its records as to the initial meeting of the



board in determination of sending out such notices presents no taint upon the validity of the board's subsequent actions. Therefore, we hold that this subsection of the appellants' third assignment of error is without merit.

For all of the foregoing reasons, we hold that the assignments of error of the appellant employees must be hereby dismissed, and the judgment of the Common Pleas Court of Hamilton County, Ohio, is hereby affirmed.

BUZZARD, J., concurs.

COOK, P.J., dissenting.

I must respectfully dissent from the majority opinion of the Court.

The right to follow any of the common occupations of life is one of the fundamental rights of citizenship (*Sanning v. Cincinnati,* 81 Ohio St. 142; *Crosby v. Rath,* 136 Ohio St. 352). It is a principal ingredient of civil liberty and is embraced in the right of all men to seek and obtain happiness (*Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.,* 111 U.S. 746, 762, 28 L. ed 585, 588, 4 S. Ct. 652).

The right to labor and to follow a chosen trade or occupation is a property right protected by the Constitution of Ohio and the United States. (*Seligman v. Toledo Moving Pictures Operators Union,* 88 Ohio App. 137; *Drake Bakeries v. Bowles,* 31 ONP NS 425).

By Chapter 4117, the General Assembly of Ohio has legislatively provided for the termination of employment of public employees who strike. Certainly such interference with a person's constitutional right to liberty and his property right to labor and enjoy the rewards thereof requires no deprivation of those rights without due process of law.

R. C. 4117.04 states:

> "*Any public employee who, without the approval of his superior,* unlawfully fails to report for duty, absents himself from his position, or abstains in whole or in part from full, faithful, and proper performance of his position for the purpose of inducing, influencing, or coercing a change in conditions, as compensation, rights, privileges, or obligations of employment or of intimidating, coercing, or unlawfully influencing others from remaining in or from assuming such public employment is on strike, *provided that notice that he is on strike shall be sent to such employee by his superior by mail addressed to his residence as set forth in his employment record.* Such employee, upon request, shall be entitled to establish that he did not violate sections 4117.01 to 4117.05, inclusive, of the Revised Code. Such request must be filed in writing, with the officer or body having power to remove such employee, within ten days after regular compensation of such employee has ceased. *In the event of such request such officer or body shall within ten days commence a proceeding for the determination of whether such sections have been violated by such public employee, in accordance with the law and regulations appropriate to a proceeding to remove such public employee.* Such proceedings shall be undertaken without unnecessary delay." (underlining ours)

In the instant case, the appellants are public employees of the Board of Education of the Princeton City School District. The "superior" of the employees is the Board of Education. The Board of Education did not give approval for the employees to fail to report for duty or to conduct themselves in the manner complained of. The Board notified the employees by mail that they were "on strike." The Board conducted a proceeding (hearing) as the "employer" at which it determined Chapter 4117 of the Revised Code of Ohio had been violated by the employees.



To send the employees a letter advising them they were "on strike," the Board was controlled by the definition of a strike as set forth in R. C. 4117.04.

The later proceeding (hearing) before the Board was to determine whether the employees were "on strike" (in violation of Chapter 4117), the same question it was required to resolve before sending the letters to advise the employees they were "on strike."

Some might argue the notice sent by the Board was in effect a "show cause order" similar to charges in contempt of court, but the language of R. C. 4117.04 is of a positive and affirmative nature and leaves no room for such an interpretation.

I do not believe, under the facts in the instant case, that the employees could receive due process of law in the determination of whether they violated Chapter 4117 of the Ohio Revised Code.

I agree with the statement of the Supreme Court of the United States in *In the Matters of Lee Roy Murcheson and John White*, 99 L ed 942 at page 946 where it said:

> "A fair trial in a fair tribunal is a basic requirement for due process. Fairness of course requires an absence of actual bias in the trial of cases. *But our system of law has always endeavored to prevent even the probability of unfairness.* To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest can not be defined with precision. Circumstances must be considered. *This court has said, however, that 'every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process.' Tumey v. Ohio,* 273 U.S. 510, 532, 71 L ed 749, 758, 47 S Ct. 437, 50 ALR 1243. Such a stringent rule may sometimes bar trial

> by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. *But to perform its high function in the best way 'justice must satisfy the appearance of justice.' Offutt v. United States,* 348 U.S. 11, 99 L ed 11, 75 S Ct. 11." (underlining ours)

Where the Board of Education, pursuant to R. C. 4117.04 of the Ohio Revised Code, makes a determination the employees are on strike and then presides over a proceeding to determine if they are on strike (and thus in violation of Chapter 4117 of the Ohio Revised Code), a situation exists where temptation would be great for the Board members to fail "to hold the balance, nice, clear and true" between the employees and their employer, the Board of Education of the Princeton City School District.

Such a proceeding does not satisfy the "appearance of justice" requirement of the *Offutt* case, supra.

Where the "superior" of public employees who is required, pursuant to R. C. 4117.04 of the Revised Code of Ohio, to notify said employees that they are on strike is the same entity as the "employer" of said employees who is required, pursuant to said R. C. 4117.04, to conduct a proceeding to determine if said employees violated Chapter 4117 of the Revised Code of Ohio, which prohibits strikes by public employees, a public employee subjected to said notice and hearing is denied due process of law in violation of the Fifth and Fourteenth Amendments of the United States Constitution and Section 16 of Article 1 of the Ohio Constitution and the action of said "employer" in determining said public employees violated Chapter 4117.04 is invalid.

In my opinion, assignment of error I is well taken and constitutes prejudicial error.



Accordingly, I would reverse the judgment of the trial court and enter final judgment for the appellants.

COOK, P. J., OF THE ELEVENTH APPELLATE DISTRICT, AND HOLMES, J., OF THE TENTH APPELLATE DISTRICT, SITTING BY ASSIGNMENT IN THE FIRST APPELLATE DISTRICT OF OHIO.

BUZZARD, J., RETIRED, AND ASSIGNED TO ACTIVE DUTY UNDER AUTHORITY IF SECTION 6(C), ARTICLE IV, CONSTITUTION.

*PLEASE NOTE:*

The Court has placed of record its own entry in this case on the date of the release of this Decision.

## APPENDIX B

## THE SUPREME COURT OF THE STATE OF OHIO

**No. 75-604**

1975 TERM

To wit: September 12, 1975

THE STATE OF OHIO,
City of Columbus.

MARY JANE ANDERSON ET AL.,
Appellants,

vs.

BOARD OF EDUCATION,
Princeton City School District,
Appellee.

### MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR HAMILTON COUNTY TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.
COSTS:

Motion Fee, $20.00, paid by Peter J. Gee.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.



## APPENDIX C

## THE SUPREME COURT OF OHIO

**No. 75-604**

1975 TERM

To wit: September 12, 1975

THE STATE OF OHIO,
City of Columbus.

MARY JANE ANDERSON ET AL.,
Appellants,

vs.

BOARD OF EDUCATION,
Princeton City School District,
Appellee.

### APPEAL FROM THE COURT OF APPEALS FOR HAMILTON COUNTY

This cause, here on appeal as of right from the Court of Appeals for HAMILTON County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for HAMILTON County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

# APPENDIX D

## CONSTITUTIONAL AND STATUTORY PROVISIONS

Fourteenth Amendment, United States Constitution:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## OHIO REVISED CODE

§ 143.01 Definitions.

As used in sections 143.01 to 143.48, inclusive, of the Revised Code:

(A) "Civil service" includes all offices and positions of trust or employment in the service of the state and the counties, cities, city health districts, general health districts, and city school districts thereof.

(B) "State service" includes all such offices and positions in the service of the state, the counties, and general health districts thereof, except the cities, city health districts and city school districts.

(C) "Classified service" signifies the competitive classified civil service of the state, the several counties, cities, city health districts, general health districts, and city school districts thereof.

(D) "Appointing authority" signifies the officer, commission, board or body having the power of appointment to, or removal from, positions in any



office, department, commission, board, or institution.

(E) "Commission" signifies the municipal civil service commission of any city.

(F) "Employee" signifies any person holding a position subject to appointment, removal, promotion, or reduction by an appointing officer.

§ 143.08 Unclassified and classified service.

The civil service of the state and the several counties, cities, city health districts, general health districts, and city school districts thereof shall be divid d into the unclassified service and the classified service.

(A) The unclassified service shall comprise the following positions, which shall not be included in the classified service, and which shall be exempt from all examinations required by sections 143.01 to 143.48, inclusive, of the Revised Code:

(1) All officers elected by popular vote or persons appointed to fill vacancies in such offices;

(2) All election officers and the employees and clerks of persons appointed by boards of elections;

(3) The members of all boards and commissions, and heads of prinicpal departments, boards, and commissions appointed by the governor or by and with his consent; and the members of all boards and commissions and all heads of departments appointed by the mayor, or, if there is no mayor such other similar chief appointing authority of any city or city school district; such sections 143.01 to 143.48, inclusive, of the Revised Code do not exempt the chiefs of police departments and chiefs of fire departments of cities from the competitive classified service;

(4) The members of county or district licensing boards or commissions and boards of revision, and deputy county auditors;

(5) All officers and employees elected or appointed by either or both branches of the general assembly, and such employees of the city legislative authority as are engaged in legislative duties;

(6) All commissioned and noncommissioned officers and enlisted men in the military service of the state including military appointees in the office of the adjutant general;

(7) All presidents, business managers, administrative officers, superintendents, assistant superintendents, principals, deans, assistant deans, instructors, teachers, and such employees as are engaged in educational or research duties connected with the public school system, colleges, and universities, as determined by the governing body of said public school system, colleges, and universities; and the library staff of any library in the state supported wholly or in part at public expense;

(8) Three secretaries, assistants, or clerks and one personal stenographer for each of the elective state officers; and two secretaries, assistants, or clerks and one personal stenographer for other elective officers and each of the principal appointive executive officers, boards, or commissions, except civil service commissions, authorized to appoint such secretary, assistant, or clerk and stenographer;

(9) The deputies and assistants of elective or principal executive officers authorized to act for and in the place of their principals, or holding a fiduciary relation to such principals and those persons employed by and directly responsible to elected county officials and holding a fiduciary or administrative relationship to such elected county officials, and the employees of such county officials whose fitness would be impracticable to determine by competitive examination, provided, that this subdivision shall not affect those persons in county employment in the classified service as of September 19, 1961. Nothing in this subdivision applies to any



position in a county department of welfare created pursuant to sections 329.01 to 329.10, inclusive, of the Revised Code.

(10) Bailiffs, constables, official stenographers, and commissioners of courts of record, and such officers and employees of courts of record as the commission finds it impracticable to determine their fitness by competitive examination;

(11) Assistants to the attorney general, special counsel appointed or employed by the attorney general, assistants to county prosecuting attorneys, and assistants to city solicitors;

(12) Such teachers and employees in the agricultural experiment stations; such student employees in normal schools, colleges, and unversities of the state; and such unskilled labor positions as the director of state personnel or any municipal civil service commission may find it impracticable to include in the competitive classified service; provided such exemptions shall be by order of the commission or the director, duly entered on the record of the commission or the director with the reasons for each such exemption;

(13) Such noncitizens of the United States employed by the state, its counties or cities, as physicians or nurses who are duly licensed to practice their respective professions under the laws of Ohio, or medical assistants, in mental, tuberculosis, or chronic disease hospitals, or institutions.

(B) The classified service shall comprise all persons in the employ of the state and the several counties, cities, city health districts, general health districts, and city school districts thereof, not specifically included in the unclassified service, to be designated as the competitive class and the unskilled labor class.

(1) The competitive class shall include all positions and employments in the state and the counties,

cities, city health districts, general health districts, and city school districts thereof, for which it is practicable to determine the merit and fitness of applicants by competitive examinations. Appointments shall be made to, or employment shall be given in, all positions in the competitive class that are not filled by the promotion, reinstatement, transfer, or reduction as provided in sections 143.01 to 143.48, inclusive, of the Revised Code, and the rules of the director of state personnel, by appointment from those certified to the appointing officer in accordance with such sections.

(2) The unskilled labor class shall include ordinary unskilled laborers. Vacancies in the labor class shall be filled by appointment from lists of applicants registered by the director. The director or the commission shall in his rules require an applicant for registration in the labor class to furnish such evidence or take such tests as the director deems proper with respect to age, residence, physical condition, ability to labor, honesty, sobriety, industry, capacity, and experience in the work or employment for which he applies. Laborers who fulfill the requirements shall be placed on the eligible list for the kind of labor or employment sought, and preference shall be given in employment in accordance with the rating received from such evidence or in such tests. Upon the request of an appointing officer, stating the kind of labor needed, the pay and probable length of employment, and the number to be employed, the director shall certify from the highest on the list, double the number to be employed, from which the appointing officer shall appoint the number actually needed for the particular work. In the event of more than one applicant receiving the same rating, priority in time of application shall determine the order in which their names shall be certified for appointment.



§ 143.27 Tenure of office; reduction, suspension, removal and demotion.

The tenure of every officer or employee in the classified service of the state and the counties, cities, city health districts, general health districts, and city school districts thereof, holding a position under sections 143.01 to 143.48, inclusive, of the Revised Code, shall be during good behavior and efficient service and no such officer or employee shall be reduced in pay or position, suspended, or removed, except for incompetency, inefficiency, dishonesty, drunkness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of such sections or the rules of the director of state personnel or the commission, or any other failure of good behavior, or any other acts of misfeasance, malfeasance, or nonfeasance in office.

In any case of reduction, suspension of more than five working days, or removal, the appointing authority shall furnish such employee with a copy of the order of reduction, suspension, or removal, which order shall state the reasons therefor. Such order shall be filed with the director of state personnel and state personnel board of review, or the commission, as may be appropriate.

Within ten days following the filing of such order, the employee may file an appeal, in writing, with the state personnel board of review or the commission. In the event such an appeal is filed, the board or commission shall forthwith notify the appointing authority and shall hear, or appoint a trial board to hear, such appeal within thirty days from and after its filing with the board or commission, and it may affirm, disaffirm, or modify the judgment of the appointing authority.

In cases of removal or reduction in pay for disciplinary reasons, either the appointing authority

or the officer or employee may appeal from the decision of the state personnel board of review or the commission to the court of common pleas of the county in which the employee resides in accordance with the procedure provided by section 119.12 of the Revised Code.

In the case of the suspension for any period of time, or demotion, or removal of a chief of police or a chief of a fire department or any member of the police or fire department of a city; the appointing authority shall furnish such chief or member of a department with a copy of the order of suspension, demotion, or removal, which order shall state the reasons therefor. Such order shall be filed with the municipal civil service commission. Within ten days following the filing of such order such chief or member of a department may file an appeal, in writing, with the municipal civil service commission. In the event such an appeal is filed, the commission shall forthwith notify the appointing authority and shall hear, or appoint a trial board to hear, such appeal within thirty days from and after its filing with the commission, and it may affirm, disaffirm, or modify the judgment of the appointing authority. An appeal on questions of law and fact may be had from the decision of the municipal civil service commission to the court of common pleas in the county in which such city is situated. Such appeal shall be taken within thirty days from the finding of the commission.

§ 4117.01 Definitions. (GC § 17-7)

As used in sections 4117.01 to 4117.05, inclusive, of the Revised Code:

(A) "Strike" means the failure to report for duty, the willful absence from one's position, the stoppage of work, or the abstinence in whole or in part from the full, faithful, and proper performance of the duties of employment, for the purpose of



inducing, influencing, or coercing a change in the conditions, compensation, rights, privileges or obligations of employment, or of intimidating, coercing, or unlawfully influencing others from remaining in or from assuming such public employment. Such sections do not limit, impair, or affect the right of any public employee to the expression or communication of a view, grievance, complaint, or opinion on any matter related to the conditions or compensation of public employment or their betterment, so long as such expression or communication is not designed to and does not interfere with the full, faithful, and proper performance of the duties of employment.

(B) "Public employee" means any person holding a position by appointment or employment in the government of this state, or any municipal corporation, county, township, or other political subdivision of this state, or in the public school service, or any public or special district, or the service of any authority, commission, or board, or in any other branch of the public service.

§ 4117.02 Strike by public employees prohibited. (GC §§ 17-8, 17-9)

No public employee shall strike.

No person exercising any authority, supervision, or direction over any public employee shall have the power to authorize, approve, or consent to a strike by one or more public employees, and such person shall not authorize, approve, or consent to such strike.

§ 4117.03 Reinstatement. (GC § 17-11)

A person violating sections 4117.01 to 4117.05, inclusive, of the Revised Code, may be appointed or reappointed, employed, or re-employed, as a public employee, but only upon the following conditions:

(A) His compensation shall in no event exceed that received by him immediately prior to the time of such violation;

(B) His compensation shall not be increased until after the expiration of one year from such appointment or reappointment, employment or re-employment.

(C) Such person shall be on probation for a period of two years following such appointment or reappointment, employment or re-employment, during which period he shall serve without tenure and at the pleasure of the appointing officer or body.

§ 4117.04 Strike defined. (GC § 17-12)

Any public employee who, without the approval of his superior, unlawfully fails to report for duty, absents himself from his position, or abstains in whole or in part from full, faithful, and proper performance of his position for the purpose of inducing, influencing, or coercing a change in the conditions, as compensation, rights, privileges, or obligations of employment or of intimidating, coercing, or unlawfully influencing others from remaining in or from assuming such public employment is on strike, provided that notice that he is on strike shall be sent to such employee by his superior by mail addressed to his residence as set forth in his employment record. Such employee, upon request, shall be entitled to establish that he did not violate sections 4117.01 to 4117.05, inclusive, of the Revised Code. Such request must be filed in writing, with the officer or body having power to remove such employee, with ten days after regular compensation of such employee has ceased. In the event of such request such officer or body shall within ten days commence a proceeding for the determination of whether such sections have been violated by such public employee,



in accordance with the law and regulations appropriate to a proceeding to remove such public employee. Such proceedings shall be undertaken without unnecessary delay.

§ 4117.05 Termination of employment. (GC § 17-10)

Any public employee who violates sections 4117.01 to 4117.05, inclusive, of the Revised Code, shall thereby be considered to have abandoned and terminated his appointment or employment and shall no longer hold such position, or be entitled to any of the rights or emoluments thereof, except if appointed or reappointed.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-729

MARY JANE ANDERSON,
AUDREY L. BURKE, et al.,

*Petitioners,*

v.

BOARD OF EDUCATION, PRINCETON CITY SCHOOL DISTRICT,

*Respondent.*

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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Respondent, Board of Education, Princeton City School District, opposes the Petition for a Writ of Certiorari for the reasons presented herein.

## OPINION BELOW

The Court of Common Pleas for Hamilton County, Ohio, rendered a memorandum opinion on March 5, 1974, which was not reported. (Appendix A, *infra* p. 20).

## QUESTIONS PRESENTED

1. Whether Petitioners have an interest in property or liberty cognizable under the Fourteenth Amendment to the Constitution of the United States?

2. Whether the Ferguson Act, Chapter 4117 of the Ohio Revised Code, which was invoked by Respondent against certain of its public employees during a strike, is a deprivation of due process of law contrary to the Fourteenth Amendment to the Constitution of the United States on its face?

3. Whether the Ferguson Act, as applied by Respondent in this case, is a deprivation of due process of law contrary to the Fourteenth Amendment to the Constitution of the United States?

## PERTINENT STATUTORY PROVISIONS

The text of Chapter 2506, Ohio Revised Code, which is a relevant statutory provision not set forth in the Petition for a Writ of Certiorari is contained in Appendix B, *infra* p. 22.

## COUNTER-STATEMENT OF THE CASE

The bus drivers of the Princeton City School District sought in January, 1972, to have the Board of Education of the District recognize the Ohio Association of Public School Employees ("OAPSE") as the bargaining agent for the bus drivers only to collectively negotiate their terms and conditions of employment. This demand was specifically made in a telegram to the President of the Board received on January 15, 1972. It went on to state that the drivers would strike if the demand was not granted. The Board did not recognize OAPSE as a bargaining agent for the drivers. It is undisputed that on January 24, 1972,



the fifty-five Petitioners and other drivers did not report to work and that picketing was in progress for at least two weeks at various school buildings in support of the demand for recognition.

On January 24, 1972, and thereafter, the Board sent a letter invoking the Ferguson Act, to sixty drivers who did not report for work. Pursuant to Section 4117.04, Ohio Revised Code, each of the Petitioners and the other drivers requested a hearing to establish that he or she did not violate the Ferguson Act. Such hearings were scheduled and notices of them were sent by the Board to each involved employee and his or her attorney, if there was one.

The general format of each of the sixty hearings was the same. Initially, objections to the hearings were raised by counsel for the Petitioners and were overruled. Counsel for the drivers then sought to examine each Board member as to his "fairness and openmindedness. . . ." This request was denied.

Each hearing then proceeded with the presentation by counsel for the Board of evidence that the involved driver had violated the Ferguson Act. Each such witness was subject to cross examination by counsel for the Petitioners.

Each driver was then given an opportunity to testify or present other evidence. However, none of the Petitioners chose to take the witness stand and testify under oath or to present other evidence to establish that they were not on strike or to rebut, contradict or otherwise dilute the evidence already adduced about their actions. Instead, each offered to read a "statement" while refusing to take the witness stand or the oath. The objection to this "procedure" was sustained, although it was clearly emphasized that each driver could take the stand and give sworn testimony relevant to the subject matter of the hearing.

Each Petitioner refused to do this. Although the Petition for Certiorari now before this Court (*Petition* at p. 5)

and the opinion of the Court of Appeals (*Petition*, Appendix A, at p. 23) erroneously state that petitioners "statement" was not read, the "statement" was proffered and read to the Board by counsel for Petitioners.

Thereafter, the Board issued individual written decisions in each of the sixty cases setting forth the facts and conclusions as found by the Board in each case. With respect to the fifty-five Petitioners herein, the Board found that the individuals had violated the Ferguson Act by engaging in an illegal strike. In four other instances the Board found that individual drivers had not violated the Ferguson Act. In one other instance, although the Board found that the individual had violated the Act, that driver did not appeal the Board's decision and is not a Petitioner.

Petitioners thereafter appealed the Board's decision according to the Ohio Administrative Procedure Act, Chapter 2506, Ohio Revised Code, to the Court of Common Pleas for Hamilton County. The Common Pleas Court did not permit the introduction of any additional evidence, and in a memorandum opinion affirmed the Board's decisions in all fifty-five cases. Petitioners then appealed to the Court of Appeals for the First Appellate District, Hamilton County, Ohio, which affirmed the decision of the Common Pleas Court in a decision issued on May 19, 1975. The Supreme Court of Ohio upheld the Court of Appeals by dismissing Petitioners' appeal on September 12, 1975.

## REASONS FOR DENYING WRIT

The facts of this case present neither a federal question of substance upon which this Court has not yet spoken nor a federal question of substance decided in conflict with the decisions of this Court. The following portions of this Brief support these contentions.



## I.

## SINCE PETITIONERS HAVE NO PROPERTY RIGHT AND THEIR LIBERTY HAS NOT BEEN INFRINGED, PETITIONERS ARE NOT ENTITLED TO THE CONSTITUTIONAL PROTECTION OF DUE PROCESS OF LAW.

A necessary prerequisite to Petitioner's invocation of any right to due process under the Fourteenth Amendment to the Constitution of the United States is the existence of property rights in which they have an interest or some circumspection of their liberty. It is well settled that such property rights "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. . . ." *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972). See also *Arnett* v. *Kennedy*, 416 U.S. 134, 185 (1974) (dissenting opinion, White, J.). Thus, Ohio law determines the existence of any property right in the instant case.

Petitioners point to their Civil Service status under Ohio law as a basis for arguing that they possess a property right in continued employment. (*Petition*, at pp. 8-9). However, the Civil Service rights of public employees in Ohio are pre-empted with respect to strike activities by the provisions of the Ferguson Act, Chapter 4117, Ohio Revised Code. *Bell* v. *Board of Trustees*, 21 Ohio App. 2d 49, 254 N.E.2d 711 (1969). A similar result was reached in *Lake Michigan College Federation of Teachers* v. *Lake Michigan Community College*, 390 F.Supp. 103 W.D. Mich., 1974), rev'd on other grounds, 518 F.2d 1091 (6th Cir., 1975), where a Michigan statute governing collective bargaining and labor relations, rather than tenure or employment contracts, was held to be the sole source of any rights of striking employees.

Thus, if Petitioners possess a property right in the circumstances of this case, it arises from the Ferguson Act.

The Ferguson Act, however, provides only a right to a hearing before the Board on the limited issue of whether they had been on strike. The Board held such a hearing and the evidence presented by the Board showed that Petitioners had, in fact, been on strike. Petitioners received that to which they were entitled. The full panoply of rights encompassed in the phrase due process is not constitutionally compelled in these circumstances. As the Court of Appeals in *Lake Michigan College*, supra at 1095, stated, "If the . . . [statute] instills any expectation in public employees, it is that they will be terminated . . . according to specified procedures if they go on strike." Here, Petitioners were discharged in accordance with the procedures of the Ferguson Act. They were entitled to no more. See *Arnett* v. *Kennedy*, supra.

Petitioners argue, further, that they are entitled to due process because their Ferguson Act discharges limit their "liberty" to seek other employment or to form other associations in the community. In *Roth*, supra, this Court held that the mere failure to renew an employment contract without any allegation affecting the employee's good name, reputation, honor or integrity does not impinge on any liberty protected. In *Michigan College*, supra at 1097, the Sixth Circuit held that the discharge of public employees under a statute similar to the Ferguson Act did not raise any inference that the discharged employee's liberty would be diminished. As in that case, the Ferguson Act discharge did not discredit their "honesty, morality and integrity or . . . [damage] their standing in the community." *Id.* Since Petitioners had advertised by their picketing that they were on strike, the finding that they were on strike and the subsequent discharge solely on that basis did not diminish their liberty beyond what they, themselves, had done.



Thus, Petitioners have no liberty or property rights to be protected by the Constitution, their due process arguments are groundless, and their Petition should be denied. The remainder of this Brief assumes, arguendo, that Petitioners did possess some interest in liberty or property and shows that, even if that were the case, the Ferguson Act hearings did not deprive them of any right guaranteed by the Fourteenth Amendment.

## II.

## THE FERGUSON ACT, CHAPTER 4117, OHIO REVISED CODE, IS NOT UNCONSTITUTIONAL ON ITS FACE AS A DENIAL OF DUE PROCESS OF LAW CONTRARY TO THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

In Ohio, strikes by public employees are proscribed by Section 4117.02, Ohio Revised Code, which provides: "No public employee shall strike." Sections 4117.01 through 4117.05, inclusive, Ohio Revised Code, provide sanctions which may be invoked against striking public employees. These sanctions ultimately lead to the termination of the striking public employee. Section 4117.05, Ohio Revised Code.

It is clear that public employees, including bus drivers, have no constitutionally protected right to strike. *United Federation of Postal Clerks* v. *Blount*, 325 F.Supp. 879 (D.D.C., 1971), aff'd 404 U.S. 802 (1971); *Bennett* v. *Gravelle*, 323 F.Supp. 203 (D. Mar., 1971), aff'd 451 F.2d 1011 (5th Cir., 1971), cert. den. 407 U.S. 917 (1972); *Anderson Fed. of Teachers* v. *School, City of Anderson*, 251 N.E.2d 15 (S.Ct. Ind., 1969), cert. den. 399 U.S. 928 (1970). The common law rule is that strikes by public employees are illegal in the absence of a statute specifically permitting them. *Bennett* v. *Gravelle*, *supra*. As is the case

in Ohio, such strikes are prohibited by statute in a substantial number of states. Thus, the purpose of the Ferguson Act, to make strikes by public employees illegal and to provide sanctions for the violation of this proscription, is not constitutionally infirm.

The Ferguson Act is initiated by the mailing of a "notice that he is on strike" to the employee by his "superior." Section 4117.04, Ohio Revised Code. Respondent invoked that statute in its January 24, 1972 letter to the drivers. Each employee then requested hearings pursuant to Section 4117.04, Ohio Revised Code, to "establish that he did not violate" the Ferguson Act. Such statutory hearings are to be conducted by the "officer or body having power to remove such employee." Section 4117.04, Ohio Revised Code. Under Ohio law the "superior" and the "officer or body having power to remove" may be the Board of Education. *Abbott* v. *Myers*, 20 Ohio App.2d 65, 251 N.E.2d 869 (1969).

Petitioners' fundamental contention is that it is constitutionally impermissible for the respondents to both send the notice "deeming" the petitioners to be on strike and, later, to sit in judgment of whether individual petitioners were engaged in the strike. They argue that since Ohio law permits this to occur, the law is unconstitutional on its face for combining the roles of prosecutor and judge.

Petitioners' argument to this effect mistakes the basic nature of the statutory notice. In order to send the statutory notice that the petitioners were "deemed" to be on srike, the Board had only to determine that a strike was in progress and that the individual to whom the notice was sent was absent from work. There was no need to pre-judge whether a particular individual was on strike. The sending of such notices does not show any prediliction by the Board to find that a particular public employee was



on strike. Therefore, the statutory scheme is not void as unconstitutional.

The actual results of the statutory hearings support their constitutionality. In four instances wherein the drivers did introduce evidence as to their not being on strike, the Board evidenced its lack of bias by finding that these individuals, to whom notices had been sent, were not engaged in the strike.

In *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683 (1948), this Court held that preconceptions by the members of the FTC that "the operation of the multiple basing point system as they had studied it was the equivalent of a price fixing restraint of trade . . . did not necessarily mean that the minds of its members were closed on the subject of the respondent's base point practices." *Id.* at 700-701. Thus, this Court recognized that the mere fact that as a general matter the FTC believed a certain pricing practice to be contrary to law did not mean that they were biased with respect to the decision to be made concerning a particular pricing practice. Similarly, the mere fact that Respondents in the instant case had determined that a strike was in progress and, therefore, issued the statutory notice, does not support the argument that they had prejudged whether any particular individual was, in fact, participating in the strike.

Another illustration of this principal is *Duke* v. *North Texas State University*, 469 F.2d 829 (5th Cir., 1972), cert. den. 412 U.S. 932 (1973), where the court upheld a teaching assistant's dismissal. The teaching assistant received notice of her termination in a letter from the university's acting president. The letter also stated that she would be afforded an administrative hearing before the President's Cabinet, composed of the acting president and three vice presidents. At the hearing the teaching assistant

was represented by counsel and had the opportunity to present evidence and cross-examine witnesses. The decision makers determined not to rehire her and made written findings as the basis for its decision.

This procedure is almost identical to that employed by the Board in this case. In *Duke* it was challenged as denying due process of law to the teaching assistant involved, but the Court stated in finding no deprivation of constitutional rights:

> "We decline to establish a per se rule that would disqualify administartive hearing bodies such as the President's Cabinet from hearing internal university matters solely for the reason that the members are employees of the Board and because some of them participated in the initial investigation of the incident and initiation of the cause under consideration.
>
> * * * * *
>
> We are satisfied that the record here clearly demonstrates that Mrs. Duke received procedural due process of law." *Id.* at 834.

The acting president's original dismissal letter in the *Duke* case related to a single individual's conduct. Therefore, the chances of bias and prejudgment were greater in *Duke* than in the instant case where the Board had only to decide that a strike was in progress. Still, the Fifth Circuit found that there was no deprivation of constitutional rights.

Although this issue was not raised to a constitutional level in *Arnett* v. *Kennedy*, supra, at 155-156, n.21, it is clear that the majority would permit the individual making the initial determination that dismissal may be appropriate to gather evidence and make the final judgment of discharge. In addition, the plurality would find no constitutional violation based on this procedure and in light of the other safeguards present. *Arnett* v. *Kennedy*, supra at



164-171. In the instant case, the grounds upon which to make an inference of bias are even more tenuous, and in any case sufficient safeguards were present. Ultimately, of course, Petitioners obtained review with the ability to introduce erroneously excluded evidence in the Ohio judicial system. Chapter 2605, Ohio Revised Code.

Petitioners cite a series of cases in support of their position. Respondent does not dispute the efficacy of the general principles stated in these cases. However, these principles of law were generated and applied in factual situations markedly different from those involved in this case.

The direct personal involvement or interest of the judicial or quasi-judicial decision maker in the outcome of the case may be sufficient to support disqualification. This interest may be financial. See *Tumey* v. *Ohio*, 272 U.S. 510 (1927); *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972); *Gibson* v. *Berryhill*, 411 U.S. 564 (1973). Or the interest may be personal in nature, as where the decision maker and the affected individual have been involved in demonstrations of personal animosity. See *In re Murchison*, 349 U.S. 133 (1955); *Offutt* v. *United States*, 348 U.S. 11 (1954); *Mayberry* v. *Pennsylvania*, 400 U.S. 455 (1971); *In re Contempt of Common Pleas Court, Probate Division*, 30 Ohio St.2d 182, 283 N.E.2d 126 (1972). No such personal interest of either of these types may be appropriately inferred in this case from the mere fact that the members of the Board sent the notice that a strike was in progress and later presided over the statutory hearings to determine whether a particular employee took part in the strike.

In other cases the constitutional vice was that no hearing of any sort was convened before the individual's rights were affected. Cases of this type are *Morrissey* v. *Brewer*, 408 U.S. 471 (1972); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970); and *Morgan* v. *United States*, 304 U.S. 1 (1938).

In the instant case Petitioners had a full hearing before any decision was made. They and their counsel had received written notice of the hearing setting forth its purpose. The hearing was public and Petitioners were confronted with the evidence against them. They cross-examined witnesses against them and were then afforded an opportunity to present evidence on their behalf. The decisions and findings of the Board were presented in writing, and Petitioners were entitled to and took advantage of the review of these decisions in the Courts of Ohio.

Still other cases cited by petitioners involve situations in which the right to a fair hearing was denied because the decision of the tribunal did not rest upon evidence presented at the hearing, even though a hearing was conducted. *Ohio Bell Telephone Company* v. *Public Utilities Commission*, 301 U.S. 292 (1937); *West Ohio Gas Co.* v. *Public Utilities Commission (No. 1)*, 294 U.S. 63 (1935); *West Ohio Gas Co.* v. *Public Utilities Commission (No. 2)*, 294 U.S. 79 (1935); and *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38 (1936). Respondent's decisions here were based solely on the evidence adduced at the hearings; thus the cases cited by Petitioners are inapplicable. And none supports the contention that the Ferguson Act is unconstitutional on its face.

For these reasons, the Board's dual role of sending the statutory notices to invoke the Ferguson Act, and the later holding of an evidentiary hearing to determine whether, in fact, particular individuals were engaged in the strike, does not result in per se bias or prejudice. Therefore, the Ferguson Act is constitutional on its face.



## III.

## THE FERGUSON ACT, AS APPLIED IN THIS CASE, DOES NOT RESULT IN A DENIAL OF DUE PROCESS BY FAILING TO PROVIDE A FAIR HEARING TO PETITIONERS.

### A. Respondent Did Not Violate Petitioner's Right to Due Process by Conducting Ferguson Act Hearings after Refusing to Recognize a Union as Their Collective Bargaining Agent.

The focus of this issue is very similar to the question presented in the previous section. Petitioners argue that the Board had been engaged in a colliquy with them concerning the recognition of a union as a collective bargaining agent for bus drivers only, and that as a result the Board was antagonistic toward the strikers, and therefore, had prejudged the question of each individual's participation in the strike. This, they argue, is a denial of constitutionally required due process.

This argument is founded on the false assumption that the Board will prejudge everyone to whom notices were sent in order to seek vengeance against those who were engaged in the strike. The Sixth Circuit has recognized the invalidity of the assumption. In *Lake Michigan College Federation of Teachers* v. *Lake Michigan Community College*, 518 F.2d 1091 (6th Cir., 1975), the court held that there was no constitutional right to due process where a public employee has neither a property right in re-employment nor suffers an infringement of liberty because of a denial of re-employemnt. The court went on to state, in circumstances equivalent to this case, as a substantial alternative basis for its result that the termination hearings would meet "minimum constitutional standards." *Id.* at 1098.

The constitutional flaw complained of there was that the Board, as part of the administration which was unable to

reach a wage agreement with striking teachers, must be biased and, therefore, may not conduct hearings similar to Ferguson Act hearings without denying due process of law. The court responded as follows:

> "The only issue [in such a hearing] will be one of fact—whether a particular employee in fact participated in the strike. The Board's sole objective in conducting the . . . [statutory] hearings is to ensure that innocent teachers were not mistakenly identified as strikers, and there is nothing in the record to indicate that the Board will not perform this duty fairly.
>
> * * * * *
>
> Moreover, even if the Board members were hostile toward the Union and the striking faculty, this animosity would hardly manifest itself in the form of an unfair decision against a teacher who did not participate in the strike. [T]he District Court's finding of bias cannot stand. Further the statute . . . provides for a judicial review in the State Circuit Court from an adverse decision following a . . . [statutory] hearing." *Id.* at 1099.

This quotation is equally applicable to the instant case and supports Respondent's contention that the procedure followed by the Board did not deny bus drivers due process. The Board would not find an individual, who was not engaged in the strike, to have been engaged in the strike, because of prejudice against those who did strike. That they did not do so is shown by the fact that four individuals, to whom Ferguson Act notices were sent, were found not to have engaged in the strike.

In fact, due process was observed at the hearing. Both sides were represented by counsel. A record of the proceedings was transcribed. Both sides were afforded the opportunity to confront and cross-examine witnesses who presented evidence against them. Both sides were provided



with an opportunity to be heard. The Board made written findings of fact, which were the basis for its written conclusions. Petitioners had, and employed, the right to appeal the Board's decision into the Ohio judicial system where an appeal hearing provided the additional opportunity to adduce any evidence improperly excluded by the Board. A hearing under these circumstances, on the issue of whether or not a particular employee was actually engaged in a strike, does not violate due process merely because the decision maker was the employer of the Petitioners and had opposed the recognition of a union as their collective bargaining agent. This relationship does not show nor mandate the inference that the Respondents would be biased on the issue of whether a particular individual was engaged in the strike and this was the only issue at the hearing.

Finally, Petitioners note the recent case of *Hortonville Education Assn.* v. *Hortonville Joint School District No. 1*, 66 Wis.2d 469, 225 N.W.2d 658 (1975). The Wisconsin Supreme Court held, interalia, that teachers discharged for striking were denied due process because hearings were conducted by school board members who had been engaged in the bargaining process. However, the facts in *Hortonville* were substantially different than here. First, there was no statutory procedure governing hearings for striking public employees as there is in Ohio.

Second, at the hearing the school board presented no evidence upon which to base its findings that the teachers were on strike, but instead used the presumption they were on strike and placed the burden on the teacher to show that this was not true. In the instant case, even though it would appear that the Ferguson Act placed such a burden on the bus drivers, the Board counsel assumed that burden and went forward with evidence showing that each of the Petitioners had, in fact, been striking. Thus, the record of

the hearings here provide a sufficient evidentiary basis for their discharge.

Third, in Wisconsin there does not appear from the record to have been any appeal route into the state judicial system. On that basis the Wisconsin Supreme Court fashioned a remedy of a hearing in the state trial court. This remedy, however, recognizes that the initial determination would be appropriately made by the school board. *Id.* at 673. Here, Ohio law provides for the review of any Ferguson Act discharge and for the introduction of additional evidence. Section 2506.03, Ohio Revised Code, provides that the Common Pleas Court is to proceed with the hearing on such review as in the trial of a civil action. This statute also provides that the Court had the authority to consider additional evidence if Petitioners had shown that Respondent had wrongfully denied their right to present their "position arguments and contentions," to "offer and examine witnesses," to "cross-examine witnesses purporting to refute" their position, to offer evidence to refute evidence and testimony offered in opposition to "their position," or to "proffer any such evidence into the record, if the admission thereof" was denied.

This Court has granted the Hortonville school board's Petition for Certiorari, No. 741606, to review the Wisconsin Supreme Court's decision in *Hortonville*, supra. The facts of the instant case are substantially dissimilar and, therefore, *Hortonville* provides neither support for Petitioner's argument of bias nor support for the granting of the Writ in this case.

### B. The Denial of the Opportunity to Examine the Board to Determine Whether There Is any Actual Bias Does Not Deny Due Process of Law.

Petitioners argue that it was a denial of due process for the Board to deny them the opportunity to cross-examine the Board as to the existence of any personal bias at the



hearings. It is argued that if actual bias is shown by the examination of the Board, the hearing will deny due process. Petitioners argument may have some validity where it can present some evidence of bias as a foundation for the inquiry. Here, however, Petitioners presented no evidence of any sort as a basis for such an inquiry, so that the proposed cross-examination might be appropriately characterized as a "fishing expedition." [1]

This proposed inquiry is infirm for another reason. Petitioners' allegations of bias do not distinguish between members of the Board, and are in some respects another aspect of Petitioner's attack on the structure of the Ferguson Act. Even if bias were shown as to the Board as a whole, the Board cannot disqualify itself, because there is no other body statutorily permitted to make the determinations required by the Ferguson Act. *Bell* v. *Board of Trustees*, 34 Ohio St.2d 70, 296 N.E.2d 276 (1973). The parameters of this "rule of necessity" are explored in Davis, *Administrative Law Treatise*, Section 12.04 (1958). In *Evans* v. *Gore*, 253 U.S. 245 (1920), this Court expressed its view of the rule:

> "Because of the individual relation of the members of this Court to the question, thus broadly stated, we cannot but regret that its solution falls to us. . . . The plaintiff was entitled by law to invoke our decision . . . and there was no other appellate tribunal to which under the law he could go. . . . In this situation, the only course open to us is to consider and decide the cause—a conclusion supported by precedents reaching back many years." *Id.* at 247-248.

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[1] Petitioners argue that the Board and bus drivers were adversaries because of the refusal of the Board to acquiesce in their desire for collective bargaining and that by sending the statutory strike notices they had shown that they had prejudged the issue of whether a particular employee was engaged in the strike. The lack of merit of these contentions has been discussed above. Similarly, they do not constitute a basis for a finding that further examination of the Board members is warranted.

The Board must make the decision, regardless of any actual or asserted disqualifications of its members, because there is no one else to do it. For this reason the examination of the Board as requested by Petitioners is irrelevant to any decision which might be made by the Board.

The lack of substance of Petitioner's proposed inquiry is emphasized by the answer made by President Cook of the Board when asked if "you have made up your mind that these people are on strike . . . ?" After ruling that the matter was irrelevant to any issue before the Board at the hearing, he answered, "No, I have not."

Even if it is assumed that it was error for the Board to exclude this inquiry, that ruling did not prejudice Petitioners. The findings of the Board are supported by the records in each of the individual cases. The Board had before it evidence establishing as a factual matter in each case that the person involved was on strike within the meaning of the Ferguson Act. Petitioners presented no evidence to rebut this evidence. It is clear that a finding of a violation of the Ferguson Act was not only justified but unavoidable in each of these cases. Under these circumstances the denial of the opportunity to engage in an unfounded and unsupported effort to question "the qualifications" of the members of the Board to sit in the proceedings was not a denial of due process.

### C. Respondent Did Not Deny Due Process When Its President Ruled on Objections While Employee's Counsel Questioned Him.

It is clearly an unusual circumstance which would result in the presiding officer of a public hearing taking the witness stand. However, in this situation School Board President Cook was called to the stand to present substantive evidence only to the extent of identifying a telegram sent to the Board through him as its President.



On cross-examination Petitioners sought to examine him with respect to his alleged bias and with respect to the procedural steps which the Board had taken to invoke the Ferguson Act. Since no evidence had been introduced as a foundation for these inquiries, and they were otherwise irrelevant to a Ferguson Act hearing, Cook, as presiding officer at the hearing, properly upheld the objections to the questions.

While Petitioners assert that this is a flagrant violation of justice, this does not indicate any bias on the part of the President or the Board for the reasons discussed in detail in the proceeding two sections. Of course, some questions may be appropriate if a proper foundation is established by the introduction of some evidence tending to show bias or the failure of the Board to act properly. But no such evidence was presented here. No specific allegation of bias or faulty procedure was made. Under these circumstances, the President prevented unwarranted delay in the proceedings by excluding irrelevant questions. The circumstances would have been no different had another member of the Board been presiding during Cook's testimony. Therefore, these exclusions are fully appropriate, and did not deny due process to Petitioners.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that Petitioners Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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By GREGORY L. HELLRUNG
and
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## APPENDIX A

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

**No. A-721428**

In the Matter of the Appeal of
MARY ANDERSON, et al.,

*Appellant,*

v.

BOARD OF EDUCATION
Princeton City School District,

*Appellee.*

*and*

**No. A-721429**

In the Matter of the Appeal of
AUDREY L. BURKE, et al.,

*Appellant,*

v.

BOARD OF EDUCATION
Princeton City School District,

*Appellee.*

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## MEMORANDUM OPINION

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NURRE, J.:

This matter is before the Court on appeal from a decision of the Princeton Board of Education finding appellants on strike in violation of Section 4117.01-4117.05, inclusive, of the Revised Code of Ohio and terminating their employment.



*Appendix A*

The Court has reviewed the extensive briefs of the parties, the oral arguments of counsel, and the appropriate authorities and finds that the judgment entered by the Board of Education was proper and correct in all respects and that said decision is hereby affirmed.

Counsel is hereby requested to present an entry in accordance with this ruling.

* * * * *

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March 5, 1974.

## CHAPTER 2506: APPEALS FROM ORDERS OF ADMINISTRATIVE OFFICERS AND AGENCIES

### § 2506.01 Appeal from decisions of any agency of any political subdivision.

Every final order, adjudication, or decision of any officer, tribunal, authority, board, bureau, commission, department or other division of any political subdivision of the state may be reviewed by the common pleas court of the county in which the principal office of the political subdivision is located, as provided in sections 2505.01 to 2505.45, inclusive, of the Revised Code, and as such procedure is modified by sections 2506.01 to 2506.04, inclusive, of the Revised Code.

The appeal provided in sections 2506.01 to 2506.04, inclusive, of the Revised Code is in addition to any other remedy of appeal provided by law.

A "final order, adjudication, or decision" does not include any order from which an appeal is granted by rule, ordinance, or statute to a higher administrative authority and a right to a hearing on such appeal is provided; any order which does not constitute a determination of the rights, duties, privileges, benefits, or legal relationships of a specified person; nor any order issued preliminary to or as a result of a criminal proceeding.

### § 2506.02 Filing of transcript.

Within thirty days after filing the notice of appeal, the officer or body from which the appeal is taken shall, upon the filing of a praecipe, prepare and file in the court to which the appeal is taken, a complete transcript of all the original papers, testimony and evidence offered, heard and



taken into consideration in issuing the order appealed from. The costs of such transcript shall be taxed as a part of costs of the appeal.

### § 2506.03 Hearing of appeal.

The hearing of such appeal shall proceed as in the trial of a civil action but the court shall be confined to the transcript as filed pursuant to section 2506.02 of the Revised Code unless it appears on the face of said transcript or by affidavit filed by the appellant that:

(A) The transcript does not contain a report of all evidence admitted or proffered by the appellant.

(B) The appellant was not permitted to appear and be heard in person or by his attorney in opposition to the order appealed from:

(1) To present his position, arguments and contentions;

(2) To offer and examine witnesses and present evidence in support thereof;

(3) To cross-examine witnesses purporting to refute his position, arguments and contentions;

(4) To offer evidence to refute evidence and testimony offered in opposition to his position, arguments and contentions;

(5) To proffer any such evidence into the record, if the admission thereof is denied by the officer or body appealed from.

(C) The testimony adduced was not given under oath.

(D) The appellant was unable to present evidence by reason of a lack of the power of subpoena by the officer or body appealed from or the refusal, after request, of such officer or body to afford the appellant opportunity to use the power of subpoena when possessed by the officer or body.

(E) The officer or body failed to file with the transcript, conclusions of fact supporting the order, adjudication or decision appealed from;[,] in which case, the court shall hear the appeal upon the transcript and such additional evidence as may be introduced by any party. At the hearing, any party may call as if on cross-examination, any witness who previously gave testimony in opposition to such party.

**§ 2506.04 Finding and order of court.**

The court may find that the order, adjudication or decision is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable and probative evidence on the whole record. Consistent with its findings, the court may affirm, reverse, vacate, or modify the order, adjudication or decision, or remand the cause to the officer or body appealed from with instructions to enter an order consistent with the findings or opinion of the court. The judgment of the court may be appealed by any party on questions of law pursuant to sections 2505.01 to 2505.45, inclusive, of the Revised Code.